

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Oct 12, 2011, 3:29 pm  
BY RONALD R. CARPENTER  
CLERK

No. 83690-6

RECEIVED BY E-MAIL

hjh

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

Cause No. 272010

---

ELCON CONSTRUCTION, INC.

Appellant,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

---

**ELCON CONSTRUCTION'S ANSWER TO WASHINGTON  
DEFENSE TRIAL LAWYERS' AMICUS BRIEF**

---

KEVIN W. ROBERTS, WSBA #29473  
ROBERT A. DUNN, WSBA #12089  
MICHAEL R. TUCKER, WSBA #38005  
DUNN & BLACK, P.S.  
111 North Post, Suite 300  
Spokane, WA 99201  
(509) 455-8711  
Attorneys for Appellants

ORIGINAL

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. WDTL IGNORES THE UNDERLYING FACTS .....	1
A. EWU Concealed And Misrepresented The Existence Of Its Study That Concluded A 1,500 Feet Deep Well Would Be Required. ....	2
B. EWU Affirmatively Misrepresented The Existence Of The Study Which Set Forth The Subsurface Conditions.....	3
III. DISCUSSION .....	6
A. Public Works Contractors Cannot "Bargain" or "Negotiate" To Protect Themselves From The Risk Of Fraud.....	6
B. EWU Had Duties Imposed By Law That Were Not Created By Or Disclaimed In The Contract.....	7
C. EWU Also Had A Duty To Disclose Its Superior Knowledge.....	8
D. The Contract Did Not Allocate The Risk That EWU Would Commit Fraud In Order To Induce Contractors To Bid. ....	9
E. Public Policy Demands That Government Entities Not Commit Fraud To Secure Bids. ....	10
IV. CONCLUSION.....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<u>Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.</u> , 170 Wn.2d 442 (2010) .....	7
<u>Eastwood v. Horse Harbor Found.</u> , 170 Wn.2d 380 (2010) .....	1, 5, 7
<u>Hanson Excavating Co., Inc. v. Cowlitz County</u> , 28 Wn. App. 123, 126 (1981) citing <u>Platt Electric Supply, Inc. v. Seattle</u> , 16 Wn. App. 265, 274 (1976) .....	6
<u>Lincoln v. Keene</u> , 51 Wn.2d 171, 173 (1957) .....	9
<u>Nelson Const. Co. of Ferndale, Inc. v. Port of Bremerton</u> , 20 Wn. App. 321, 327-28 (1978) .....	8
<u>Simpson Timber Co. v. Palmberg Const. Co.</u> , 377 F.2d 380 (1967) .....	9
<u>Walla Walla Port Dist. v. Palmberg</u> , 280 F.2d 237 (9th Cir. 1960) .....	3
 <u>Other Authorities</u>	
<u>1 Bruner and O'Connor on Construction Law</u> , §3:25 (2008) .....	3
<u>33 Wa. Pract.</u> 8:5 .....	8

## **I. INTRODUCTION**

The Washington Defense Trial Lawyers ("WDTL") asks that EWU be allowed to blatantly violate duties imposed by law not to commit fraud. In doing so, WDTL ignores the application of the independent duty rule as set forth in Eastwood, ignores the fact that on public works projects bidders do not have any opportunity to negotiate the terms of the contract, and ignores the public policy reasons for preventing fraud by government agencies. EWU had an independent duty not to commit fraud or any of the other torts alleged. EWU breached those duties in order to wrongfully obtain bids on the project and in order to get Elcon Construction to enter into the contract. Fundamental fairness and the public policy of Washington demand that EWU be held accountable for its conduct.

## **II. WDTL IGNORES THE UNDERLYING FACTS**

A review of the record confirms that WDTL's arguments ignore relevant facts in this case that illustrate precisely why EWU had an independent duty not to commit fraud and why Elcon could not "*negotiate*" contract terms to protect itself from EWU's fraud.

A. EWU Concealed And Misrepresented The Existence Of Its Study That Concluded A 1,500 Feet Deep Well Would Be Required.

WDTL ignores the fact that the Study was intentionally concealed from Elcon and other potential bidders and that EWU affirmatively misrepresented the information it had relating to wells being drilled on campus. CP 864-865. The Study concluded a well drilled 1,500 feet deep would be required to obtain adequate water from the Grande Ronde aquifer if drilled anywhere on campus. CP 564-588; CP 316-356; CP 640-41. Since the new well was going to be in the Grande Ronde, the information that any such well needed to be drilled to 1,500 feet was critical to the contractors assessing whether to bid and agreeing to enter into the type of unit price contract proposed by EWU. CP 624-636. WDTL also ignores the fact that EWU concealed the Study from its engineer, TD&H. CP 730-735. As a result, it was EWU and not the engineer who unilaterally decided to dictate a well depth of 750 feet for both the "*pre-design*" and the "*design*" depth. CP 651-655; 666-67; 695; and 716. The fact EWU unilaterally dictated the "*design depth*" while knowing that a well would need to be 1,500 feet

deep confirms that EWU's fraud was intended to induce bids by misrepresenting the actual scope of the project.

**B. EWU Affirmatively Misrepresented The Existence Of The Study Which Set Forth The Subsurface Conditions.**

WDTL's arguments fail to discuss or consider the fact that prior to bid Elcon performed an "*independent investigation of the site or subsurface conditions*" as set forth in the instructions to bidders<sup>1</sup>. CP 313. Elcon requested that EWU provide all of the information EWU had relating to the Project, any other wells in the area, or the geology of wells in the area, "*including all exploratory work done by Owner...*" CP 864-865; CP 1113. See also CP 673. As a public works owner, EWU had an independent duty to supply the requested information which clearly contained important information a contractor would need to decide whether or not to bid. See e.g. Walla Walla Port Dist. v. Palmberg, 280 F.2d 237 (9th Cir. 1960); 1 Bruner and O'Connor on Construction Law, §3:25 (2008).

However, EWU breached that duty when it misrepresented the information it possessed, provided minimal information that did not

relate to the Grande Ronde aquifer, and affirmatively misrepresented that no water studies existed! Id.; CP 673. The evidence confirms that in order to induce bids, EWU concealed the Study, the fact that a campus Grande Ronde well would have to be drilled to a depth of 1,500 feet, and misrepresented the information it had available. Thus, there was nothing that Elcon could have done to protect itself from such fraud. As a result of EWU's conduct, Elcon was induced into a contract and suffered damages it was prevented from recovering under EWU's contract but which are recoverable in tort.

EWU designed two 750 foot wells, despite the Study instructing that a Grande Ronde well be drilled 1500 feet deep. CP 703-704; 740. EWU represented the 750 foot depth to Elcon and other potential bidders as the scope of the Project. CP 678-680. The represented depth was critical because as depth increased, the drilling equipment required for drilling deeper changed. Specifically, drilling at a depth of 1,500 feet, as the Study indicated, requires special drilling equipment not commonly found in this region. See e.g. CP 713-714. Indeed, prior

---

<sup>1</sup> WDTL references the investigation provision of the contract. However, under both the instructions to bidders and the contract, Elcon requested information from EWU that resulted in the fraud at issue.

to the bid, EWU had been informed that only a limited number of well drillers in the area were capable of drilling to 750 feet. CP 662, EWU knew the 1,500 foot deep well necessary for water required special equipment. CP 713-714, EWU intentionally misrepresented to bidders the scope of the drilling in order to get bidders. CP 678-680, EWU also expressly misrepresented that the only geological information available to the bidders was a well log and video for existing EWU wells located in a completely different aquifer. CP 864-865; CP 624-636.

WDTL claims that Washington law should be applied in such a way that allows EWU to engage in fraud with complete impunity as long as it is able to mislead a contractor into bidding the project. However, Eastwood confirms the summary dismissal of Elcon's case was incorrect. Therefore, the Trial Court's decision should be reversed and this action remanded for trial.

//

//

//

//



### III. DISCUSSION

#### A. Public Works Contractors Cannot "Bargain" or "Negotiate" To Protect Themselves From The Risk Of Fraud.

WDTL claims that Elcon "*in the course of bargaining*" should have "*allocated risk*". That argument illustrates precisely why Elcon should not be barred from pursuing its fraud and tort claims in this case. The public bidding process does not allow "*bargaining*" or negotiations by bidders on a public works project. Indeed, Washington law and policy provides exactly the opposite. "*Negotiation of a contract for a project requiring competitive bidding circumvents the public policy favoring competitive bidding and 'opens the door to possible fraud, collusion, and favoritism.'*" Hanson Excavating Co., Inc. v. Cowlitz County, 28 Wn. App. 123, 126 (1981) citing Platt Electric Supply, Inc. v. Seattle, 16 Wn. App. 265, 274 (1976).

Furthermore, in this case the allegations are that EWU committed fraud in order to induce Elcon to bid the project and enter into the contract. As a result, Elcon bid the project based upon EWU's fraudulent representations and concealment. It would be patently unfair, unjust and illogical for EWU to avoid liability for fraud simply

because its misrepresentations resulted in a contract. The duties breached by EWU were separate and apart from the contract and Elcon should be entitled to pursue the damages caused by the breach of those duties.

**B. EWU Had Duties Imposed By Law That Were Not Created By Or Disclaimed In The Contract.**

WDTL incorrectly argues that the *"Independent Duty Rule holds parties to the terms of their agreement"*. However, that statement illustrates a fundamental misunderstanding of the analysis required by the independent duty rule. As explained by this Court in Eastwood v. Horse Harbor Found., 170 Wn.2d 380 (2010) and Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442 (2010), the independent duty rule analysis focuses on the source of the tortfeasor's duty. Under the independent duty rule, *"[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract."* Affiliated FM, 170 Wn.2d at 449 quoting Eastwood, 170 Wn.2d at 388.

Here, the duties at issue were not created as a result of the contract. EWU had an independent duty not to make false

representations (i.e. that the wells would only be 750 feet deep and that it had provided Elcon all studies relating to hydrogeology) or conceal material information. Indeed, neither WDTL nor EWU dispute that such independent duties were imposed by Washington law on EWU.

C. EWU Also Had A Duty To Disclose Its Superior Knowledge.

WDTL suggests that allowing Elcon to pursue EWU's breach of the independent tort duties it owed would create "*a duty of disclosure for EWU*". See WDTL Amicus Brief, p. 10. However, WDTL's argument illustrates a lack of knowledge with regard to public work projects and the governing law. In addition to the duty imposed by law not to commit fraud, as a public works owner, EWU also had an existing duty to disclose its superior information as part of the bidding process, including an affirmative duty to disclose the Study to bidders since it was within EWU's knowledge and not readily available. See 33 Wa. Pract. 8:5 and Nelson Const. Co. of Ferndale, Inc. v. Port of Bremerton, 20 Wn. App. 321, 327-28 (1978)(the Port "*would have breached duty to disclose all information it possessed with reference to rocky soil conditions if it willfully withheld such information peculiarly within its knowledge and not readily obtainable by contractors or failed*

to give a complete and truthful answer to a broad inquiry by contractor...") See also Simpson Timber Co. v. Palmberg Const. Co., 377 F.2d 380 (1967). Indeed, "where an inquiry is made, one owes a duty to answer truthfully." Lincoln v. Keene, 51 Wn.2d 171, 173 (1957). Consequently, allowing Elcon to pursue EWU's breaches of the independent duties it owed would not "create" a new duty as WDTL mistakenly suggests.

**D. The Contract Did Not Allocate The Risk That EWU Would Commit Fraud In Order To Induce Contractors To Bid.**

WDTL makes several references suggesting that the contract "allocated risk". However, a review of the record confirms that there was nothing in the contract that allocated the risk that EWU had committed fraud in order to obtain bids on the project. Nor was there anything in the contract or instructions to bidders that disclaimed or identified that EWU may commit fraud. Indeed, as explained above, the allocation of risk argument is a complete red-herring since neither Elcon, nor any other bidder, could "bargain" or "negotiate" the allocation of risk on a public works project. Supra. Elcon is not attempting to "renegotiate" the contract. Instead, Elcon simply seeks

to pursue the damages it suffered as a result of EWU's fraud. EWU made affirmative misrepresentations and fraudulently concealed information that was in its control. Elcon should be allowed to have its day in court to pursue EWU's breach of these independent duties.

**E. Public Policy Demands That Government Entities Not Commit Fraud To Secure Bids.**

WDTL makes a confusing policy argument referencing the UCC and claiming that holding EWU accountable for breaching duties it owed independent of any contract would allow "*a disappointed party*" to "*attack virtually any private ordering of risk*". However, WDTL confuses contractual obligations with independent duties. In this case, there was no "*ordering of risk*". The duties that were breached in this case relate directly to fraud that was committed in order to suck Elcon into a limited recourse contract based on false information. There simply was no disclaimer of fraud in the contract at issue.

On the other hand, there are numerous public policy reasons for allowing claims of fraud in the public works bidding process to be pursued after the fraud results in a contract. If a government agency like EWU is allowed to commit fraud in order to convince contractors

to bid a project, but can avoid liability simply because a contract is signed, public contractors will have to factor into their bids the possibility that the public agency has committed fraud. Since there is no bargaining or negotiation on public works projects, the only way for contractors to address the potential would be to increase the amount of their bids to cover the risk. This would result in increased costs for the construction of public works projects in the state of Washington and would be contrary to public policy.

In contrast, allowing contractors to pursue claims when public entities violate independent tort duties would benefit the public. If public works agencies know they may be held accountable, it is more likely they will not engage in this type of conduct. As a result, contractors will be provided with complete information to bid public projects. This will result in more informed bids and ultimately better prices.

#### IV. CONCLUSION

WDTL and EWU advocate that public agencies should be able to commit fraud with impunity as long the fraud results in a contract. However, that argument is against public policy and is inconsistent

with this Court's recent decisions. Therefore, Elcon respectfully requests that the Trial Court's summary dismissal be overturned and this matter remanded for trial.

DATED this 12<sup>th</sup> day of October, 2011.



DUNN & BLACK, PS

---

KEVIN W. ROBERTS  
ROBERT A. DUNN  
MICHAEL R. TUCKER  
Attorneys for Appellants

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1<sup>st</sup> day of October, 2011,  
I caused to be served a true and correct copy of the foregoing document  
to the following:

<input type="checkbox"/>	HAND DELIVERY	Jerry Cartwright
<input checked="" type="checkbox"/>	U.S. MAIL	Carl Warring
<input type="checkbox"/>	OVERNIGHT MAIL	Attorney General Office
<input type="checkbox"/>	FAX TRANSMISSION	Torts Division
<input checked="" type="checkbox"/>	EMAIL	1116 W. Riverside Avenue Spokane, WA 99201-1106

<input type="checkbox"/>	HAND DELIVERY	Catherine Hendricks
<input checked="" type="checkbox"/>	U.S. MAIL	Office of the Attorney General
<input type="checkbox"/>	OVERNIGHT MAIL	Torts Appellate Program
<input type="checkbox"/>	FAX TRANSMISSION	800 5 <sup>th</sup> Ave., Suite 2100
<input checked="" type="checkbox"/>	EMAIL	Seattle, WA 98104-3188

<input type="checkbox"/>	HAND DELIVERY	Robert H. Crick, Jr.
<input checked="" type="checkbox"/>	U.S. MAIL	Robert Crick Law Firm PLLC
<input type="checkbox"/>	OVERNIGHT MAIL	9 S. Washington, Ste. 708
<input type="checkbox"/>	FAX TRANSMISSION	Spokane, WA 99201
<input checked="" type="checkbox"/>	EMAIL	

<input type="checkbox"/>	HAND DELIVERY	Daniel J. Gunter
<input checked="" type="checkbox"/>	U.S. MAIL	Shata L. Stucky
<input type="checkbox"/>	OVERNIGHT MAIL	Riddell Williams PS
<input type="checkbox"/>	FAX TRANSMISSION	1001 Fourth Ave. Plaza,
<input checked="" type="checkbox"/>	EMAIL	Ste. 4500 Seattle, WA 98154

  
KEVIN W. ROBERTS